

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KAREN FOSS, et al.,

Plaintiffs,

V.

KING COUNTY, a political subdivision of the State of Washington; et al.,

Defendants.

C09-1823Z

ORDER

THIS MATTER comes before the Court on three motions to dismiss, one brought by Conservation District (the “Conservation District”), docket no. 10, and two brought by County, Linda Holecek, Joe Miles, and Stephanie Warden (the “King County Defendants”), docket nos. 11 and 13. The remaining defendants, the S.H.A.D.O.W. Group, Habitat and Diversity of Wetlands, the Shadow Lake Bog Foundation, Max Prinsen, and Erin Wodjewoski Prinsen (the “SHADOW Defendants”), have not joined in any of these motions and have not separately moved for dismissal. Having reviewed all papers filed in part of and in opposition to each pending motion, the Court now enters this Order.

1 **Background**

2 Plaintiffs Gerald Foss, Karen Foss, Margaret Foss, and Scott Foss filed the complaint
 3 at issue on December 22, 2009, against the Conservation District, the King County
 4 Defendants, and the SHADOW Defendants. The complaint alleges causes of action under
 5 (i) the Civil Rights Act of 1871, 42 U.S.C. § 1983, (ii) the Ku Klux Klan Act of 1871,
 6 42 U.S.C. § 1985(3), and (iii) the Racketeer Influenced and Corrupt Organizations Act
 7 (“RICO”), 18 U.S.C. §§ 1961-1968. The claims involve two parcels of land located in King
 8 County, which plaintiffs denominate as the “Park” Property (approximately 10½ acres) and
 9 the “Woods” Property (roughly 42 acres), respectively. Complaint at ¶ 14 (docket no. 1).
 10 The properties are adjacent to each other and are situated along the shore of Shadow Lake.
 11 *Id.* Historically, the properties were owned by the Foss family, which operated a resort.
 12 *Id.* at ¶¶ 15-16. The properties passed from one generation to the next until 2005, when the
 13 properties were auctioned pursuant to a court order, *id.* at ¶ 43, and the Conservation District
 14 acquired the Woods Property for \$1,062,000, *see id.* at ¶¶ 46 & 58. At the same auction,
 15 plaintiffs purchased the Park Property for \$560,000. *Id.* at ¶ 47.

16 The order to auction the properties stemmed from a state court action initially seeking
 17 testamentary division of both parcels. Under Washington law, a subdivision of property
 18 must comply with certain stringent requirements before it may be recorded. *Toulouse v. Bd.*
 19 *of Comm’rs of Island County*, 89 Wn. App. 525, 528, 949 P.2d 829 (1998) (citing
 20 RCW 58.17.030). Divisions made by “testamentary provisions” or “the laws of descent,”
 21 however, are exempt from these requirements. RCW 58.17.040(3); *see Telfer v. Bd. of*
 22 *County Comm’rs of San Juan County*, 71 Wn. App. 833, 862 P.2d 637 (1993) (holding that
 23 property held in tenancy in common, resulting from either intestacy or a will’s residuary
 24 clause, may be divided into separate parcels without complying with platting requirements).
 25 In 1999, some of the owners of the properties at issue applied to King County for
 26 testamentary division of the parcels. *See Foss v. D’Annunzio*, 2002 WL 31749399 at *1

1 (Wash. Ct. App.). One of the owners of the Woods Property, Holly D'Annunzio, opposed
 2 the requested division, which would have resulted in thirteen lots on the Woods Property and
 3 one lot on the Park Property, because she thought it would impair the pristine quality of the
 4 Woods Property. *Id.* As a result, Ms. D'Annunzio refused to sign the application for
 5 testamentary division. In light of Ms. D'Annunzio's objections, at the request of Joe Miles,
 6 who is one of the King County Defendants, in October 2000, Carl Foss withdrew the
 7 application for testamentary division. See Complaint at ¶¶ 28 & 29.

8 Meanwhile, three of the plaintiffs in this case, Gerald, Karen, and Margaret Foss,
 9 along with Carl Foss, now deceased, Karen Tapper, and Gloria Foss (collectively, the "State
 10 Court Plaintiffs"), pursued a partition action in King County Superior Court. 2002 WL
 11 31749399 at *1 n.2 (noting that Ms. Tapper was subsequently realigned as a defendant,
 12 alongside Ms. D'Annunzio and Artisanne Foss). During the course of the action, the State
 13 Court Plaintiffs conceded that the testamentary division exemption did not apply because not
 14 all of the co-tenants had obtained their interests in the properties via testamentary provisions
 15 or the laws of descent. *Id.* at *2. In light of the high cost of subdividing the properties in
 16 compliance with statutory requirements, the State Court Plaintiffs moved for a court-ordered
 17 sale of the properties. Ms. D'Annunzio opposed a sale, and the trial court dismissed the
 18 action without prejudice, concluding that "great prejudice," which is necessary to justify a
 19 forced sale, had not been demonstrated. *Id.* at *3. The Washington State Court of Appeals
 20 reversed the dismissal and remanded for further proceedings. *Id.* at *7. On remand, the trial
 21 court ordered the properties sold because neither parcel could be partitioned in light of
 22 "critical area regulations" and "extensive buffer requirements" relating to the shoreline of
 23 Shadow Lake. Complaint at ¶¶ 41 & 42.

24 At the auction, the winning bidder for the Woods Property was identified as the
 25 "Shadow Group." *Id.* at ¶ 46. Escrow closed in September 2005, approximately five months
 26 after the auction. *Id.* at ¶ 48. During the interim between the auction and the closing of

1 escrow, plaintiffs renewed their application for testamentary division of the Park Property, in
 2 which Ms. D'Annunzio had no interest, and as to which the owners' original request for
 3 partition had been unanimous. *Id.* at ¶¶ 49 & 50. In December 2005, Joe Miles issued a
 4 denial of the testamentary division. *Id.* at ¶ 54. In October 2006, King County paid
 5 \$545,000 to the Conservation District for a conservation easement over the Woods Property.
 6 *Id.* at ¶ 65. The Conservation District and the King County Defendants now move to dismiss
 7 on grounds that the action is time-barred or otherwise fails to state a claim upon which relief
 8 may be granted.

9 **Discussion**

10 **A. Standard for Motion to Dismiss**

11 Although a complaint challenged by a Rule 12(b)(6) motion to dismiss need not
 12 provide detailed factual allegations, it must offer "more than labels and conclusions" and
 13 contain more than a "formulaic recitation of the elements of a cause of action." *Bell Atl.*
 14 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The complaint must indicate more than mere
 15 speculation of a right to relief. *Id.* When a complaint fails to adequately state a claim, such
 16 deficiency should be "exposed at the point of minimum expenditure of time and money by
 17 the parties and the court." *Id.* at 558. A complaint may be lacking for one of two reasons:
 18 (i) absence of a cognizable legal theory, or (ii) insufficient facts under a cognizable legal
 19 claim. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984). In ruling
 20 on a motion to dismiss, the Court must assume the truth of the plaintiff's allegations and
 21 draw all reasonable inferences in the plaintiff's favor. *Usher v. City of Los Angeles*,
 22 828 F.2d 556, 561 (9th Cir. 1987). The question for the Court is whether the facts in the
 23 complaint sufficiently state a "plausible" ground for relief. *Twombly*, 550 U.S. at 570.

24 **B. Failure to Respond**

25 Although the responses to the three motions at issue purport to be filed on behalf of all
 26 plaintiffs, they are signed only by Scott Foss. Mr. Foss is not a member of the Washington

1 State Bar Association or of the bar of this Court, and he may not represent the other plaintiffs
 2 in this action. See Wash. State Bar Ass'n v. Great W. Union Fed. Sav. & Loan Ass'n,
 3 91 Wn.2d 48, 57, 586 P.2d 870 (1978) ("The 'pro se' exceptions are quite limited and apply
 4 only if the layperson is acting solely on his own behalf." (emphasis added)). Thus, plaintiffs
 5 Gerald Foss, Karen Foss, and Margaret Foss are deemed not to have filed any opposition to
 6 the motions to dismiss. Their failure to respond constitutes a basis for dismissing their
 7 claims against the Conservation District and the King County Defendants, see Local Rule
 8 CR 7(b)(2) ("If a party fails to file papers in opposition to a motion, such failure may be
 9 considered by the court as an admission that the motion has merit."), but the Court also
 10 concludes that the arguments Mr. Foss has attempted to make on their behalf lack merit.

11 **C. Civil Rights Claims**

12 Plaintiffs assert that their rights to substantive and procedural due process and to equal
 13 protection were violated during the application process for testamentary division and during
 14 the period when the King County Superior Court was considering, on remand, whether to
 15 order that the properties be sold at auction. Complaint at ¶¶ 83-111. Plaintiffs also allege
 16 that they were deprived of equal protection as a result of a conspiracy aimed at the class of
 17 persons who are property owners. Id. at ¶¶ 112-123. The King County Defendants and the
 18 Conservation District seek dismissal of these claims, brought under §§ 1983 and 1985(3),
 19 respectively, on the ground that they are time barred. The King County Defendants further
 20 contend that the § 1985(3) claim lacks merit because the statute does not protect the class of
 21 persons who are property owners.

22 The statute of limitations for actions under §§ 1983 and 1985(3) is three years. See
 23 Rose v. Rinaldi, 654 F.2d 546 (9th Cir. 1981). The limitations period commences when the
 24 plaintiff "knows or has reason to know of the injury which is the basis of the action." E.g.,
 25 Bagley v. CMC Real Estate Corp., 923 F.2d 758, 760 (9th Cir. 1991); see also Chardon v.
 26 Fernandez, 454 U.S. 6, 8 (1981) (a § 1983 claim accrues on the date of the alleged wrongful

1 conduct, *i.e.*, “the time of the *discriminatory act*, not the point at which the *consequences* of
 2 the act become painful” (emphasis in original)). The Conservation District asserts that
 3 plaintiffs’ claim accrued in April 2005, when the properties were auctioned, and that the
 4 limitations period expired in April 2008. The King County Defendants calculate the latest
 5 date on which this action might have been timely filed as sometime in October 2009, which
 6 was three years after King County paid the Conservation District for a conservation easement
 7 over the Woods Property.

8 Plaintiffs did not initiate suit until December 2009, and their §§ 1983 and 1985(3)
 9 claims are untimely. In response to the motions to dismiss, plaintiffs indicate that they did
 10 not know about the conservation easement until February 2007, Response at 2 (docket
 11 no. 17), and they reference “several thousand pages of public records” in which, in February
 12 2007, they “happened to find” interagency notes concerning Joe Miles’s request that Carl
 13 Foss withdraw the testamentary division application, Response at 3 (docket no. 18).
 14 Contrary to plaintiffs’ apparent contention, however, February 2007 is not the
 15 commencement date for the statute of limitations. Plaintiffs’ §§ 1983 and 1985(3) claims
 16 challenge the way in which their requests for testamentary division were handled, and this
 17 process was complete, at the latest, in December 2005, when their renewed application to
 18 partition the Parks Property was denied. Thus, plaintiffs’ §§ 1983 and 1985(3) claims are
 19 one year too late.

20 In addition, with regard to their § 1985(3) claim, plaintiffs fail to demonstrate that
 21 they fall within a protected class. The Ku Klux Klan Act of 1871 was enacted to protect
 22 individuals from racially-motivated conspiracies to deprive them of their legally protected
 23 rights. *See Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1536 (9th Cir. 1992). In the years
 24 since its passage, the statute has been extended beyond race “only when the class in question
 25 can show that there has been a governmental determination that its members ‘require and
 26 warrant special federal assistance in protecting their civil rights.’” *Id.* To pursue an action

1 under § 1985(3), a plaintiff must fall within a court-designated suspect or quasi-suspect class
 2 or a class that Congress, through legislation, has indicated requires special protection. *Id.*
 3 Plaintiffs cannot establish that the class of persons who are property owners constitutes a
 4 protected class. To the contrary, plaintiffs' § 1985(3) claim alleges, at most, a conspiracy
 5 "motivated by economic or commercial animus," which the statute does not reach. *See id.*
 6 at 1537 (quoting *United Bhd. of Carpenters & Joiners of Am. v. Scott*, 463 U.S. 825, 838
 7 (1983)). The Court therefore DISMISSES with prejudice plaintiffs' claims under §§ 1983
 8 and 1985(3).

9 **D. RICO Claim**

10 Under RICO, a person employed by an enterprise engaged in interstate commerce
 11 may not conduct, or participate in the conduct of, such enterprise's affairs through "a pattern
 12 of racketeering activity." 18 U.S.C. § 1962(c). Racketeering activity means acts constituting
 13 certain crimes, including particular state law felonies and various specifically enumerated
 14 federal offenses. 18 U.S.C. § 1961(1). A pattern of racketeering activity requires at least
 15 two predicate acts that occurred within ten years of each other. 18 U.S.C. § 1961(5).
 16 Plaintiffs have identified nine possible predicate acts in which they allege one or more
 17 defendants have engaged: (i) laundering of monetary instruments; (ii) fraudulent
 18 concealment; (iii) fraud by wire, radio, or television; (iv) trading in special influence;
 19 (v) misappropriation and falsification of accounts by a public officer; (vi) commercial
 20 bribery; (vii) bank fraud; (viii) extortion under color of official right; and (ix) theft or bribery
 21 concerning programs receiving federal funds. *Id.* at ¶¶ 55-82.

22 Both the Conservation District and the King County Defendants contend that
 23 plaintiffs' RICO claim is time barred. The Conservation District further argues that
 24 plaintiffs' RICO claim fails as a matter of law because it is premised on the erroneous
 25 assertion that the Conservation District had no authority to purchase the Woods Property.
 26 The King County Defendants also point to deficiencies in plaintiffs' RICO claim, namely

1 failure to adequately plead an “enterprise,” “conduct” of the enterprise’s affairs by one or
 2 more of the King County Defendants, a “pattern” of racketeering activities, or facts
 3 implicating any of the King County Defendants in the alleged racketeering activities.

4 The statute of limitations for a civil RICO claim is four years. Agency Holding Corp.
 5 v. Malley-Duff & Assocs., Inc., 483 U.S. 143 (1987). The civil RICO limitations period
 6 begins to run “when a plaintiff knows or should know of the injury that underlies his cause of
 7 action.” Pincay v. Andrews, 238 F.3d 1106, 1109 (9th Cir. 2001). This “injury discovery
 8 rule” is disjunctive, meaning that the limitations period commences when the plaintiff has
 9 either actual or constructive notice of the injury at issue. Id. Even when a plaintiff and a
 10 defendant have a fiduciary relationship, constructive notice starts the four-year clock unless
 11 the plaintiff establishes “affirmative conduct upon the part of the defendant which would,
 12 under the circumstances of the case, lead a reasonable person to believe that he did not have
 13 a claim for relief.” Id. at 1110. Both the Conservation District and the King County
 14 Defendants identify three different dates on which the limitations period might have
 15 commenced, namely (i) April 2005, when the properties were auctioned, (ii) September
 16 2005, when escrow closed, and (iii) October 2005, when plaintiffs filed a public record
 17 disclosure request “in an attempt to learn the particulars on the purchase of their property,”
 18 Complaint at ¶ 80.

19 Plaintiffs did not file suit until December 2009, over four years after any of the dates
 20 on which plaintiffs arguably had actual or constructive notice of their alleged injury.
 21 Plaintiffs seek to run the limitations period from either October 2006, when King County
 22 paid the Conservation District for the conservation easement, or February 2007, when
 23 plaintiffs allegedly learned of this transaction between King County and the Conservation
 24 District. The Court, however, is persuaded that plaintiffs’ RICO claim is precluded by the
 25 four-year limitations period. Plaintiffs’ RICO claim seeks redress for an alleged conspiracy
 26 “to prevent the property from being divided” and “to preserve it.” Complaint at ¶ 81. Thus,

1 the injury underlying plaintiffs' RICO claim occurred when control over or title to the
2 Woods Property passed from plaintiffs to the Conservation District, in either April 2005,
3 when the auction concluded, or September 2005, when escrow closed. Plaintiffs had actual
4 notice of the injury at issue on one or both of these dates. They had four years from those
5 dates to investigate and bring their RICO claim, but they failed to diligently and timely assert
6 their cause of action.

7 Moreover, plaintiffs' RICO claim against the Conservation District lacks merit
8 because it relies upon the faulty premise that the provisions of RCW 8.26.180 applied to the
9 purchase of the Woods Property. See Complaint at ¶ 58. RCW 8.26.180 sets forth policies
10 guiding the acquisition of real property for public works programs through the exercise of
11 eminent domain or in connection with a project receiving federal financial assistance. See
12 RCW 8.26.020(8) (defining "acquiring agency"); see also RCW 8.26.010 (outlining the
13 purposes and scope of RCW Chapter 8.26). RCW 8.26.180 requires an acquiring agency to
14 establish an amount believed to constitute "just compensation" for the real property at issue
15 and to make a prompt offer to obtain the property for that amount. RCW 8.26.180, however,
16 creates "no right or liability," and it does "not affect the validity of any property acquisitions
17 by purchase or condemnation." RCW 8.26.205.

18 The Woods Property was not acquired via condemnation proceedings or by eminent
19 domain; it was purchased at auction. Plaintiffs make no contention that the Conservation
20 District is an "acquiring agency" within the meaning of RCW 8.26.180. Indeed, the statute
21 under which the Conservation District was organized expressly prohibits the Conservation
22 District from obtaining property by way of condemnation. See RCW 89.08.220(5). Thus,
23 RCW 8.26.180 did not govern the transaction pursuant to which the Conservation District
24 bought the Woods Property, and noncompliance with the statute did not render the purchase
25 a misappropriation of public funds. Plaintiffs' further allegations that the Conservation
26 District engaged in RICO violations by accepting money from Ms. D'Annunzio and/or

1 others, or by furnishing funds to any of the SHADOW Defendants, are belied by the statutory
 2 provisions explicitly permitting such activities. See RCW 89.08.220(4)&(10).

3 Likewise, plaintiffs' RICO claim against the King County Defendants cannot
 4 withstand scrutiny. Plaintiffs contend that one or more of the King County Defendants were
 5 part of an "associated-in-fact" enterprise.¹ A group of individuals comprising an associated-
 6 in-fact enterprise must have a "common purpose," must be part of an "ongoing organization,
 7 formal or informal," and must "function as a continuing unit." Odom v. Microsoft Corp.,
 8 486 F.3d 541, 552 (9th Cir. 2007) (en banc). The "ongoing" inquiry asks whether the
 9 organization is "a vehicle for the commission of two or more predicate crimes," while the
 10 continuity requirement focuses on whether the challenged behavior was "'ongoing' rather
 11 than isolated activity." Id. at 552-53. In this case, plaintiffs have pleaded nothing more than
 12 "isolated activity," involving only one parcel of real property; they have offered no facts to
 13 indicate that the King County Defendants have, together with either the Conservation District
 14 or one or more of the SHADOW Defendants, engaged in similar behavior concerning other
 15 landowners or other properties. Although plaintiffs might, in theory, improve their
 16 complaint, plaintiffs have not requested leave to amend, and the Court concludes that,
 17 because the RICO claim is also time-barred, "the pleading could not possibly be cured by the
 18 allegation of other facts." Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000). The Court
 19 therefore DISMISSES with prejudice the RICO claim against the Conservation District and
 20 the King County Defendants.

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24 ¹ To be clear, plaintiffs do not allege, pursuant to 18 U.S.C. § 1962(c), that individuals employed by King
 25 County conducted King County's own affairs through a pattern of racketeering activity; rather, plaintiffs
 26 accuse one or more of the King County Defendants of colluding with the Conservation District and/or one or
 more of the SHADOW Defendants to deprive plaintiffs of the Woods Property. Thus, plaintiffs' RICO claim
 relies on the following definition of enterprise: "any union or group of individuals associated in fact although
 not a legal entity." 18 U.S.C. § 1961(4).

Conclusion

For the foregoing reasons, the Court orders:

- (1) The King County Defendants' motions to dismiss, docket nos. 11 and 13, are GRANTED;
- (2) The Conservation District's motion to dismiss, docket no. 10, is GRANTED;
- (3) Plaintiffs' claims against the King County Defendants and the Conservation District are DISMISSED with prejudice;
- (4) Plaintiffs are directed to SHOW CAUSE by September 10, 2010, why the remaining RICO claim against the SHADOW Defendants should not be dismissed with prejudice as time barred; plaintiffs are reminded that each of them must either separately respond or sign any joint response to this Show Cause Order, and that one of them may not act on behalf of, or represent, the others because doing so would constitute the unauthorized practice of law;
- (5) The SHADOW Defendants may, on or before September 17, 2010, file a reply to plaintiffs' response to this Show Cause Order; no other briefing shall be submitted absent further order of the Court; and
- (6) The Clerk is directed to NOTE this Show Cause Order for September 17, 2010, and to send a copy of this Order to all counsel of record and to plaintiffs pro se.

IT IS SO ORDERED.

DATED this 10th day of August, 2010.

Thomas S. Zilly
Thomas S. Zilly
United States District Judge